UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AT&T MOBILITY LLC, Respondent

and Case No. 05-CA-178637

MARCUS DAVIS, An Individual, Charging Party

CHARGING PARTY'S ANSWERING BRIEF TO EXCEPTIONS FILED BY THE GENERAL COUNSEL AND THE RESPONDENT

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Pursuant to Section 102.46(b)(2), the Charging Party files the following Answering Brief to Exceptions filed by the General Counsel and the Respondent.

Charging Party's Response to General Counsel's Exception 1, Respondent's Conclusions of Law Exception1, and Respondent's Failures to Find Exception 2

The General Counsel excepted to the ALJ's conclusion that Respondent's Privacy of Communications rule is an unlawful Category 2-type rule. Specifically, the General Counsel argued that the ALJ misapplied the decision in *Boeing*, 365 NLRB No. 154 (2017) by: ignoring the Board's explicit statement in *Boeing* that no camera rules prohibiting audio and video recording are lawful Category 1-type rules; failing to address "striking similarities" between the instant rule and the one in *Rio All-Suites Hotel & Casino*,362 NLRB No. 190 (2015); and misconstruing *Boeing* to conclude that the instant rule is unlawful because it could have crafted a more narrowly-tailored one. This exception has no merit. Further, Respondent excepted to the ALJ's conclusion that its business justifications do not outweigh the rule's adverse impact on employees' Section 7 rights.

In *Boeing*, the Board did not establish bright letter law that all no camera rules are lawful, Category-1 rules. Rather, the Board established a test in cases involving facially neutral rules where it would evaluate two things: 1) the nature and extent of the potential impact on NLRA rights and 2) the legitimate justification associated with the rule. It further stated that it is the Board's duty to strike a proper balance between these considerations. "We emphasize that the Board will conduct this evaluation, consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees, which is consistent with Section

8(a)(1)." *Boeing*, slip op. at 4, citing *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33-34 (1967).

While the Board delineated three categories of rules, it clearly stated that the categorization of rules (and examples based thereon) is not part of its new test. *Boeing*, slip op. at 5. Thus, the fact that the Board in *Boeing* mentioned that no camera rules, in general, fall under Category 1 is not dispositive of the issue in this case. *Id*. at 18. Importantly, the Board specifically noted 1) that there were no allegations in that case (as opposed to this case) that the no-camera rule had interfered with any type of Section 7 activity, and 2) that there was no evidence that the rule prevented employees from engaging in protected activity. *Id.* at 21.

The Board in *Boeing* recognized that its balancing test must be applied based upon a factual analysis of each case, acknowledging that it may draw reasonable distinctions between different industries and work settings in evaluating specific rules and may be led to re-designate rule categorizations. *Id.* at 16. Therefore, in applying the first prong of the balancing test, the ALJ correctly considered the fact that the rule actually (not only potentially) impacted NLRA rights as it was applied to protected activity, i.e., a steward's representational activities. (ALJSuppD. 7:27-29, FN 7.)[1] And, as to the second prong of the balancing test, he also correctly determined that the justification for the rule was outweighed by such impact, thus rendering the rule unlawful. Notably, the General Counsel concedes that "the Board's weighing of these interests does not mean that an employer's justifications override employees' Section 7 rights to record in every circumstance," such as the one here. (GC Exceptions Brief page 19.) Further, the General Counsel concedes that Respondent presented no basis to conclude that its interests

[1] The ALJ's initial decision shall be referred to as "ALJD" and the supplementary decision as "ALJSuppD."

override Steward Davis's Section 7 rights to record the disciplinary meeting he attended as a representative of the unit. (GC Exceptions Brief page 20.)

There are no "striking similarities" between the rule in *Rio All-Suites Hotel & Casino* and the rule at issue. For example, the rule in *Rio* was specifically aimed at photography and videography (hence the shorthand "no-camera rule"). Here, the rule is specifically aimed at audio, as it prohibits "record[ing] telephone or other conversations." Even if there were "striking similarities," there is no getting past the fact that here, the rule was actually applied to restrict core Section 7 activity. Additionally, given the context of the Privacy of Communications rule's being within the employee data protection (as opposed to customer data protection) policy, the company's justifications given for the restrictions on Setion 7 activities is pretextual.

The Privacy in the Workplace policy and its Privacy of Communications rule are not about customer data; they are about employee data. The rule at issue does not even mention the word "customers." Therefore, the justifications that should be considered in determining whether the rule impermissibly restricts Section 7 activity should be limited to that for which the rule was obviously written—employee privacy. While employee privacy is an important employer responsibility, it is not subject to most of the consequences the employer points to with respect to customer data breaches. And, the likelihood that sensitive employee data will be released to the general public as a result of the kind of Section 7 activity that occurred here is slim.

The justification for the Privacy of Communications rule, which was not even limited to work time or work areas, has nothing or little to do with customer privacy and, in this case, much

to do with curtailing employee rights under the NLRA. Thus, the ALJ was correct to conclude that Respondent had a duty to craft a more narrowly-tailored rule in order to avoid impacting NLRA rights.

Charging Party's Response to General Counsel's Exception 2

The General Counsel excepts to the ALJ's determination that the threat allegation wholly depends upon the lawfulness of Respondent's Privacy of Communications Rule. We agree with the General Counsel. As discussed at greater length in the Charging Party's Cross Exceptions and Brief,[2] the Board repeated many times in *Boeing* that a lawful rule could be applied unlawfully. *See, e.g.*, *Boeing*, slip op. at FN 15 & FN 76.

Steward Davis engaged in quintessential protected activity when he represented his coworker at her disciplinary meeting. Even though she was the only worker facing discipline, the presence of a union representative with a duty to ensure that the individual worker is fairly treated is so entwined with the interests of the entire unit that the Supreme Court has deemed it "the most fundamental purposes of the Act." *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 261, (1975).[3] (See, ALJSuppD. at 7:27-29 & FN 7; GC Exceptions Brief page 20.) Moreover, Davis' actions here were particularly important to his role as union steward because accurate documentation of the company's reasons for terminating an employee is key evidence if the union decides to arbitrate the issue. "Arbitrators have "often held that discharge 'must stand or fall upon the reason given at the time of discharge'; the employer cannot add other reasons when

[2] *See* argument supporting cross exception 2.
[3] Whether the meeting was investigatory or purely disciplinary is unimportant because the Court's point was not about this distinction; it was about the notion that the union's support for an *individual* facing discipline is a fundamentally protected *concerted* activity.

the case reaches arbitration." Elkouri & Elkouri, *How Arbitration Works*, 8th Ed., Bloomberg BNA, 2016, at Ch. 15.3.F.vi. [4] Whether the discipline was actually grieved is irrelevant because the union's act of gathering the information allows it to determine whether or not to file a grievance. *Gen. Motors Corp. v. N.L.R.B.*, 700 F.2d 1083, 1088 (6th Cir. 1983) ("The Union's access to adequate information concerning grievances allows it to render considered judgments and eliminate unmeritorious claims at an early stage in the proceedings."). And, as the ALJ correctly noted, Davis' recording could have been an essential element in vindicating an underlying Section 7 right. (ALJSuppD. at 4:44-45.) Therefore, when Davis engaged in this quintessentially protected, concerted activity, the statements made to him subsequently interfered with, coerced and restrained him—and others—from continuing to engage in activity protected under the NLRA.

> The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.

The Union Fork & Hoe Co., 241 NLRB 907, 908 (1979) (emphasis added), citing *Prescott Indus. Prod. Co.*, 205 NLRB 51, 1–52 (1973).

Just as discipline imposed on employees who engage in protected activity pursuant to a lawful rule may constitute unlawful interference with the exercise of protected rights in violation

[4] *Quoting* West Va. Pulp & Paper Co., 10 LA 117, 118 (Guthrie, 1947); and *citing* E.&J. Gallo Winery, 80 LA 765, 769-70 (Killion, 1983); Nickles Bakery, 73 LA 801, 802 (Letson, 1979); Gardener Denver Co., 51 LA 1019, 1022 (Ray, 1968); Unimary, 49 LA 1207,1210 (Roberts, 1968).

of Section 8(a)(1) of the Act, so too do threats, such as the one made to Steward Davis. "The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Act." *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Steward Davis was engaged in protected representational activity when recording the disciplinary meeting of a bargaining unit member. When the employer instructed him not to record in the future and not to encourage others, lest they be held accountable for not following the company's policy, it unlawfully interfered with his exercise of his Section 7 rights. Considering the totality of the circumstances, the ALJ correctly found that the rule was unlawful as it reasonably tended to interfere with employees' rights. (ALJSuppD. at 7:25-29.)

Further, the ALJ initially correctly determined that, even in the absence of the rule, the threat to Davis amounted to restraint and coercion in the face of Davis's protected activity – recording a disciplinary meeting concerning a potential grievance. (ALJD at 5:14-16.) Thus, regardless of whether the rule is considered lawful, the threat remains unlawful.

Charging Party's Response to General Counsel's Exception 3

The General Counsel excepts to the ALJ's remedy in ordering posting only at Respondent's District of Columbia stores, as opposed to nationwide. While the Charging Party does not agree with the General Counsel that the ALJ was wrong in finding the rule to be unlawful, we do agree with the General Counsel that, since the ALJ found the rule unlawful, his order should have been nationwide in scope.

There is no dispute that Respondent is a nationwide employer or that the Privacy of Communications rule at issue has nationwide application. Therefore, the remedy should

similarly be nationwide in scope. A nationwide posting is appropriate where an employer maintains an unlawful rule nationwide. See, *Mastec Advanced Technologies*, 357 NLRB 103, 109 (2011) enfd., 837 F.3d 25 (D.C. Cir.. 2016).

Thus, since the ALJ found that Respondent violated the Act by maintaining an unlawful rule and required nationwide rescission, Respondent should be required to post a notice physically at facilities nationwide and electronically to all its employees nationwide as it customarily communicates with its employees in that fashion, specifically via intranet at least, but perhaps via electronic bulletin board, e-mail, or website as well.

Charging Party's Response to Respondent's Exceptions to Findings and Conclusions 1 & 2

Respondent takes exception to the ALJ's assertions that the Privacy of Communications rule is a policy and that protection of customer information and data is covered by other policies not at issue in this case. Specifically, it contends that the Privacy of Communications rule is one provision of Respondent's Privacy in the Workplace policy and that the Privacy in the Workplace policy must be read in conjunction with such other policies.

It is disingenuous for Respondent to take the position that Privacy of Communications is not a policy when its own manager referred to it as such during the hearing. Collings said that Davis should not encourage other employees to record in-store conversations and that he did not want anyone held accountable for not following policy. (Emphasis added) (Tr. 65.) In any event, there are instances where the ALJ refers to it as a rule. (ALJSuppD. 1:35, 40 & 2 FN.2.) Regardless of whether it is considered a policy or a rule or a provision, the ALJ clearly referenced that the rule in question is part of Respondent's Privacy in the Workplace policy. (ALJD 3:1-2.) Further, the ALJ correctly found that the protection of customer information and

data is covered by other policies not at issue in this case since those policies are not alleged in the complaint to have been unlawful. (ALJSuppD. 3:17.) And, the ALJ did consider and refer to other policies to which Respondent excepts for context. (ALJSuppD. 6:30-37.)

Even if one were to consider the entire Privacy in the Workplace policy, it does not help Respondent. On its face, the policy deals with employees, not customer privacy. In fact, Respondent concedes that the first paragraph of the policy elevates the protection of sensitive personal information of employees to the same level of protection afforded customer information and that the Privacy of Communications sub-part of the broader policy states:

> Employees may not record telephone or other conversations they have with their co-workers, managers, or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and with any applicable company policy.

(Respondent's Exception Brief at 17.)

In fact, read together, it confirms even more so that Respondent was precluding substantial Section 7 activity as it cautions employees about protecting their own sensitive personal information. This is akin to unlawful rules that prohibit discussions of wages and working conditions, which are considered violative Category 3-type rules. *Boeing*, slip op. at 16. Moreover, Respondent gets no purchase in its contention that "the ban on recordings of workplace conversations with 'third parties' literally means *customer communications*." (Respondent's Exceptions Brief at 17.) Nowhere in the rule at issue or the broader policy is there a definition of third parties. If it did refer to customers, one would expect Respondent to unambiguously and specifically state as much since it repeatedly avers how important it views that interest. Moreover, the fact that Respondent knows how to specify customer information in its other policies shows that it did not mean the Privacy of Communications rule to be about

customer data. Thus, Respondent's contention that the ALJ was required to consider all of the policies that deal with protection of customer information in order to put this one rule at issue in context is inapt.

Charging Party's Response to Respondent's Findings and Conclusions Exception 3

Respondent excepts to the ALJ's conclusion that an employee has a protected right to record a disciplinary meeting or other meetings on work-time or in a work-area and/or the conclusion that Steward Davis had a right to record the meeting in this case.

As noted previously, the ALJ correctly found, and the GC concedes, that representational functions, such as the one Steward Davis was engaged in, are "central to the Act" as compared to those that are "more peripheral." *Boeing*, slip op. at 16. And, Davis' recording was part and parcel of his steward function. A primary purpose of that function was to gather information. The accuracy of his documentation and his ability to prove its accuracy would have been valuable had the termination gone to an arbitrator. And, as the ALJ pointed out, covert recording is often an essential element in vindicating the underlying Section 7 right. (ALJSuppD. at 4:44-45.) Therefore, Davis' recording of the meeting was core Section 7 activity.

Charging Party's Response to Respondent's Findings and Conclusions Exceptions 4, 5, 6, 8 & 15

Respondent excepts to the ALJ's conclusions that Respondent's Privacy in the Workplace policy is "overbroad and thus illegal," that the rule at issue is not limited to work time and/or conversations in work areas, or even conversations on Respondent's premises, that it could protect its substantial interests with a much narrower rule, that it should not be particularly burdensome to promulgate and enforce a rule that prevents the audio and visual recording of

confidential customer data, and that its security concerns are not comparable to those in a hospital or military/civilian aircraft manufacturing plant.

First, the ALJ made a finding as to the rule alleged in the complaint, i.e., Privacy in Communications, which doesn't have any limitations as to time or place on its face at all and which he found to be overbroad and unlawful. Second, Respondent's notion that the ALJ did not give sufficient weight to *Flagstaff Medical Center* and its progeny when weighing Respondent's interest in protecting the privacy of customer information is misguided. The ALJ acknowledged Respondent's significant customer privacy interests when he engaged in the *Boeing* balancing test. However, he correctly determined that there was no overriding employer interest to preclude protected recordings when employees are acting for their mutual aid or protection. Further, as noted previously, the Board in *Boeing* recognized that one needs to account for distinctions between different industries and work settings in evaluating specific rules.

Respondent's contentions that its business justifications are "even more pervasive and 'weighty' than the patient privacy interests in *Flagstaff"* or comparable to national security concerns at a highly guarded military/civilian aircraft manufacturing plant are ludicrous. (Respondent's Exception Brief at 27.) Even if one were to agree with this comparison, the justifications regarding customer privacy were pretextual. The Privacy of Communications rule was clearly not written to protect customer data. It was written to protect employee data. And, while Respondent contends that the title of the policy Privacy in the Workplace confirms that the rule is limited to the workplace, it concedes that it is not limited to work time or work areas, admitting that recording discussions anywhere at any time in the workplace may raise customer privacy interests and is therefore precluded by this rule. (Respondent's Exceptions Brief at 32-

34.) In essence, it is saying that it is justified in having a rule that does not allow any recorded dialogue anywhere on the worksite, including non-work areas, about anything, including, for example, co-workers using a recording device to document threats against them or discrimination.

The Board in *Boeing* created a balancing test for the exact purpose of determining whether the justifications for such a broad rule are outweighed by the rule's impact on NLRA rights. The ALJ properly determined that the employer's justifications here were outweighed. He suggested an example of how the rule might be tailored to avoid unlawful impact, e.g.: "violation of company policy to record in any manner customer information or data." (ALJSuppD. at 6:21-23.) This shows how easily Respondent could have written this rule to protect customer interests and avoid such broad implications and impact on Section 7 rights.

Charging Party's Response to Respondent's Findings and Conclusions Exceptions 7, 9 10 & 11

Respondent excepts to the ALJ's description and conclusion about the "rule of least privilege." It also excepts to the ALJ's conclusions that a rule forbidding the recording of conversations including a discussion of CPNI or SPI should be sufficient. It further excepts to the ALJ's finding that company supervisors would have been allowed to discuss information with Davis that Davis was not authorized to access.

When applying the *Boeing* balancing test, the ALJ was correct to consider Respondent's justification for such a broad rule, and the fact that Respondent has a number of policies on customer privacy. Those policies include a "rule of least privilege," which significantly limits those who can access customer information. The ALJ also correctly pointed out that those few

with access are trained to recognize it. And, the ALJ correctly concluded that the number of workers who could or would disclose such CPNI or SPI information in any conversation is materially diminished by these policies. Respondent is entitled to promulgate and enforce a rule whose justification does not outweigh significant impacts on NLRA rights. But the employer's justifications here are disingenuous and its other, existing policies show why the Privacy of Communications rule is unnecessarily broad. In fact, Respondent provided no examples of instances where CPNI or SPI was compromised because of an audio recording. This is not surprising since those few with such access are well trained as to recognition and disclosure requirements. Consequently, as the ALJ determined, a rule forbidding recording of conversations that include discussion of CPNI or SPI should satisfactorily address Respondent's concerns and interests and there is no need for an expansive rule that threatens core NLRA rights.

As to the ALJ's comments about Respondent's managers and supervisors (Collings and Yu) not being allowed to discuss information with Steward Davis that Steward Davis was not authorized to access, it seems odd that Respondent would except to such a finding as being unsupported by evidence, contrary to the facts, and irrelevant to the legal issues. The record and Respondent's Exceptions Brief is replete with policies and testimony that discuss the significant interest Respondent has in protecting customer privacy. Managers and supervisors must be bound by these same policies and rules, otherwise, Respondent's whole defense would fold like a tent. And, it is relevant that managers and supervisors are bound by these policies and rules because it once again shows that the likelihood of disclosure of CPNI or SPI to those unauthorized is nil. This, too, supports the ALJ's finding that the broad rule at issue is unlawful

and a more narrowly-tailored one can accomplish the purported goal of Respondent without needlessly trampling all over workers' rights under the NLRA.

Charging Party's Response to Respondent's Findings and Conclusions Exceptions 12, 13, and 14, to Respondent's Conclusions of Law Exception 2 and to Respondent's Failures to Find Exception 1.

Respondent excepts to the ALJ's conclusion that recording the meeting was protected under Section 7 of the Act, that the rule has been applied to restrict the exercise of Section 7 rights, and that Respondent violated the Act by impliedly threatened employees with discipline if they violated the rule again while engaged in protected activity. Further, it excepts to the ALJ's failure to find that the meeting occurred during work time in a work area, that Davis attended the meeting in his capacity as a steward, and that he didn't have a protected right to record that meeting.

We agree that the ALJ misstated in footnote 7 of the ALJD that it was a grievance as opposed to a disciplinary meeting. As noted previously, Steward Davis, when attending the disciplinary meeting of a bargaining unit member, properly documented the employer's reasons for termination. In doing so, he was engaged in protected representational activities that are central to the purposes of the Act. During the course of that meeting, which clearly involves the Section 7 rights of the steward, the employee being disciplined, and all others in the unit, Steward Davis used a tool to assist him in his representational duties, i.e., a recording device. He used this tool to accurately and completely gather information about the matter so that he could take appropriate next steps, such as considering whether to file a grievance protesting the action taken. Among many actions carried out by stewards, *res gestae* in such meetings are presenting

the employee's side of the story, mediating and taking notes in anticipation of subsequent grievance filing and/or complaint/charge filing with federal or state agencies. Stewards are entitled to take notes in such meetings to assist in the performance of their representational duties and Steward Davis actions are a reasonable extension of that to aid in the representational and grievance process.

There is no dispute that Davis did record the meeting by audio and that no CPNI or SPI was disclosed. Nor is there a dispute that the recording was later erased by or at the direction of Respondent and that Respondent engaged in subsequent discussions with Steward Davis about the recording being violative of the rule at issue. What is in dispute is whether the rule was lawful and whether Respondent lawfully warned Davis that future such recordings could lead to discipline for himself or his co-workers.

Respondent's justification for having a blanket rule banning all unauthorized recording does not make sense in this factual circumstance for, if Steward Davis had just taken scrupulous notes at a meeting, instead of recording, and had he become privy to CPNI or SPI in the process, he would have violated no rule while acting in his protected representational capacity. Yet, the disclosure of such information would have occurred and would have been documented in Davis' notes. Respondent certainly could not prevent that by precluding all union representation at all meetings involving bargaining unit employees.

By advising Steward Davis that he should not encourage other employees to record in-store conversations and that Respondent didn't want anyone held accountable for not following the rule, Respondent clearly invoked the rule to interfere with, coerce and restrain the similar exercise of NLRA rights in the future.

Charging Party's Response to Respondent's Proposed Order Exceptions

Respondent excepts to the proposed ALJ Order compelling it to cease and desist from maintaining the rule and impliedly threatening employees and to take affirmative action regarding related to rescission and notification requirements because it imposes obligations on Respondent that are not limited to the Charging Party.

Respondent is not contending, nor can it contend, that it does not maintain the rule at issue nationwide. Nor does it contend that those employed by Respondent have no obligation to follow the rule if they wish to avoid discipline. Since the rule was correctly found to be unlawful, in order to comport with longstanding Board law and policy, the appropriate remedy is to order nationwide rescission of such a rule and related notification to employees about such rescission so that they are aware that they are no longer subject to it.

Similarly, Respondent was intentional in making a statement to restrain Section 7 activities to an employed steward, who represents the entire unit and is required as part of his representational duties to disseminate management's concerns and directives. By threatening a steward, Respondent prevents representational assistance, not only in disciplinary meetings, but in any number of other activities. Threats of this nature affect not only the steward, but any and all bargaining unit employees for whom the union seeks to render assistance.

Thus, contrary to Respondent's contentions, these violations are not limited to the Charging Party. Thus, the ALJ was correct in not limiting his proposed Order in this way.

Submitted with respect,

/s/ Katherine Alexandra Roe

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CERTIFICATE OF SERVICE

I hereby affirm that this Answering Brief was served on the parties listed below via email on the date listed below.

/s/ Katherine Alexandra Roe

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